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No. 91-1326

In The

Supreme Court Of The United States

October Term, 1991

THE DISTRICT OF COLUMBIA
AND SHARON PRATT KELLY, MAYOR,

Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE STATE OF CONNECTICUT AND COMMONWEALTH OF MASSACHUSETTS *AS AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD BLUMENTHAL
ATTORNEY GENERAL
STATE OF CONNECTICUT
Counsel of Record
55 Elm Street
P.O. Box 120
Hartford, CT 06101
Telephone: (203) 566-2026

ARNOLD B. FEIGIN
Assistant Attorney General

SCOTT HARSHBARGER
ATTORNEY GENERAL
COMMONWEALTH OF
MASSACHUSETTS
1 Ashburton Place
Room 2019
Boston, Massachusetts 02108

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of the State of Connecticut and Commonwealth of Massachusetts as *amici curiae* pursuant to Supreme Court Rule 37.5.

The State of Connecticut has a direct interest in the outcome of the preemption issue before this Court. Con-

necticut has enacted Conn. Gen. Stat. § 31-284b, a workers' compensation statute similar to the District of Columbia Workers' Compensation Equity Amendment Act of 1990 ("Equity Amendment Act"). In *R.R. Donnelley & Sons Co. v. Prevost*, 915 F.2d 787, 791-94, (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1415 (1991), the United States Court of Appeals for the Second Circuit concluded that § 31-284b was not preempted by ERISA. The Second Circuit's holding that Conn. Gen. Stat. § 31-284b was not preempted by ERISA was adopted by the Appellate Court of the State of Connecticut in *Tufaro v. Pepperidge Farm, Inc.*, 24 Conn. App. 234, 237, 587 A.2d 1044 (1991).

Subsequent to the *Donnelley* and *Tufaro* decisions, Conn. Gen. Stat. § 31-284b was amended by section 12 of Public Act No. 91-339. Conn. Gen. Stat. § 31-284b, as it now exists, does not differ in any significant respect from Conn. Gen. Stat. § 31-284b as it existed at the time of the *Donnelley* and *Tufaro* decisions.

Conn. Gen. Stat. § 31-284b, as amended by section 12 of Public Act 91-339, requires employers providing accident, health, and life insurance coverage, or welfare plan payments, to active employees, to continue such benefits, or their equivalent, for employees entitled to workers' compensation. Amici App. A1. Section 31-284b applies to all employers who provide accident, health, and life insurance benefits, whether or not the employer's plan is covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* Conn. Gen. Stat. § 31-284b, as amended by Public Act No. 91-339, § 12; Conn. Gen. Stat. § 31-275, as amended by Public Act No. 91-339, § 1(10), Amici App. A3. The stated purpose of the statute is "to maintain, as nearly as possible, the income of employees who suffer employment-related injuries. . . ."

Conn. Gen. Stat. § 31-284b, as amended by Public Act No. 91-339, § 12, Amici App. A1. Income is defined as "all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance coverage and employee welfare plan contributions. . . ." *Id.* The statute does not impinge upon an employer's initial decision to provide such benefits. Rather, Conn. Gen. Stat. § 31-284b requires the continuation of benefits equivalent to those provided incident to employment to those employees suffering employment-related injuries.

Subsection (b) of § 31-284b provides four options by which an employer can meet its statutory obligation to continue benefits: (1) by purchasing insurance; (2) by "creating an injured employee's plan as an extension of any existing plan for working employees"; (3) by self-insuring; or (4) by combining as many of the above-mentioned methods as the employer may choose. Conn. Gen. Stat. § 31 284b(b), as amended by Public Act No. 91-339, § 12, Amici App. A1. The four optional methods of employer compliance provided in subsection (b) of § 31-284b clearly contemplate the creation of separately administered plans maintained solely to comply with the requirements of a state workers' compensation law. Subsection (c) of § 31-284b permits, but does not require, the additional option of continuing payments or contributions to an employee welfare plan, where the terms and conditions of the plan permit. Conn. Gen. Stat. § 31-284b(c), as amended by Public Act No. 91-339, § 12, Amici App. A1.

In addition to Connecticut's interest, the preemption issue to be decided in this case is of importance to all states. The states have a vital interest in the areas of workers' compensation, unemployment compensation and disability

insurance. The preemption analysis of the United States Court of Appeals for the District of Columbia Circuit frustrates Congress' intent of reserving those areas to the states.

SUMMARY OF ARGUMENT

The District of Columbia's workers' compensation law, the Equity Amendment Act, permits employer compliance by the establishment of plans separate from ERISA-covered plans. The Act does what this Court stated was authorized in *Shaw v. Delta Air Lines Inc.*, 463 U.S. 85 (1983). Thus, the Act is not preempted because of § 4(b)(3) of ERISA.

ARGUMENT

THE EQUITY AMENDMENT ACT IS NOT PREEMPTED BECAUSE OF § 4(b)(3), 29 U.S.C. § 1003(b)(3).

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), expressly provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) [§ 4(a)] of this title and not exempt under section 1003(b) [§ 4(b)] of this title." Section 4(b)(3) of ERISA, 29 U.S.C. § 1003(b)(3), exempts from ERISA coverage employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." The Equity Amendment Act, a workers' compensation law, is not preempted by virtue of § 4(b)(3) of ERISA. The Act does no more than that which this Court stated was permitted

in *Shaw v. Delta Air Lines Inc., supra.* "[W]hile the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing . . . benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." 463 U.S. at 108. The Second Circuit in *Donnelley, supra,* presented with a statutory scheme similar to that of the Equity Amendment Act, properly concluded under *Shaw* that such a statute is not preempted.

In *Shaw* this Court confronted the question whether ERISA preempted a New York Disability Benefits Law that required employers to pay sick-leave benefits to employees unable to work because of pregnancy or other non-occupational disabilities.[1] After finding that the statute "relate[d] to" employee benefit plans because it required employers to pay employees specific benefits, 463 U.S. at 97, the Court turned to the argument that the statute was exempt from preemption under § 4(b)(3). This Court first observed as a general rule that multibenefit plans containing both disability benefits as well as other benefits were subject to ERISA – and thus prevailed over state law – because such plans broadly served employee needs such as collective bargaining and were not maintained solely to comply with state law. *Shaw,* 463 U.S. at 106-07. In contrast, "separately administered plans" that "provide[] only those benefits required by the applicable state law" were exempt from ERISA coverage. *Id.* at 107-08.

This Court next dealt with the possibility that employers might circumvent state law entirely by adopting plans that combine disability benefits inferior to those required

[1] In *Shaw,* the Appellee Airlines' benefit plans were covered by ERISA. *Shaw,* 463 U.S. at 92.

by state law with other types of benefits. The Court's response was that states in the first instance may simply require an employer to maintain a disability plan complying with state law "as a separate administrative unit." Alternatively, states may permit employers to comply with State law by including state-mandated benefits in a multibenefit ERISA plan. *Shaw,* 463 U.S. at 108. As this Court put it, "while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." *Id.* This Court then reversed the Second Circuit's holding that New York was "not free at all" to enforce its disability statute against employers that provided disability benefits as part of multibenefit plans. *Id.*

Consistent with the reasoning of *Shaw,* the Equity Amendment Act places the burden on employers to choose the method of providing equivalent health insurance coverage. The Act does not require an employer or an ERISA trustee to maintain benefits within the confines of ERISA plans. An employer may comply with the Act by establishing separately administered plans. Any effect of the Equity Amendment Act on ERISA-covered plans is at the option of the employer. Under *Shaw,* the choice of the means of compliance with state workers' compensation, disability insurance, and unemployment compensation laws is left to the employer; the choice of compliance or noncompliance with these laws is not.

The District of Columbia Circuit's ruling that the Equity Amendment Act "relates to" ERISA-covered plans and is thus preempted conflicts with *Shaw.* Preemption by ERISA involves a two-step inquiry. In *Shaw,* the Court stated: "The issues are whether the Human Rights Law

and Disability Benefits Law 'relate to' employee benefit plans within the meaning of § 514(a) . . . *and, if so, whether any exception in ERISA saves them from preemption." Shaw,* 463 U.S. at 96 (emphasis supplied). Thus, a finding that a state law "relates to" ERISA-covered plans serves only to prompt the further inquiry whether any exception in ERISA saves the statute from preemption. The District of Columbia Circuit misread *Shaw. Shaw* makes clear that a state law of the type listed in § 4(b)(3) of ERISA is not preempted if the state law permits employer compliance by the establishment of plans separate from ERISA-covered plans. The Equity Amendment Act does precisely that.

CONCLUSION

For all the foregoing reasons, this Court should reverse the District of Columbia Circuit.

Respectfully submitted,

RICHARD BLUMENTHAL
ATTORNEY GENERAL
STATE OF CONNECTICUT
Counsel of Record
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06101
Telephone: (203) 566-2026

ARNOLD B. FEIGIN
Assistant Attorney General
State of Connecticut

SCOTT HARSHBARGER
ATTORNEY GENERAL
COMMONWEALTH OF
MASSACHUSETTS
1 Ashburton Place
Room 2019
Boston, Massachusetts 02108

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APPENDIX OF *AMICI CURIAE*

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Public Act No. 91-339, § 12

Sec. 12. Section 31-284b of the general statutes, as amended by section 8 of public act 91-32, is repealed and the following is substituted in lieu thereof:

(a) In order to maintain, as nearly as possible, the income of employees who suffer employment-related injuries, any employer who provides accident and health insurance or life insurance coverage for any employee or makes payments or contributions at the regular hourly or weekly rate for full-time employees to an employee welfare [fund, as defined in section 31-53,] PLAN shall provide to the employee equivalent insurance coverage or welfare [fund] PLAN payments or contributions while the employee is eligible to receive or is receiving compensation pursuant to this chapter, or while the employee is receiving wages under a provision for sick leave payments for time lost due to an employment-related injury. As used in this [subsection] SECTION, "income" means all forms of remuneration to an individual from his employment, including wages, accident and health insurance coverage, life insurance coverage and employee welfare plan contributions AND "EMPLOYEE WELFARE PLAN" MEANS ANY PLAN ESTABLISHED OR MAINTAINED FOR EMPLOYEES OR THEIR FAMILIES OR DEPENDENTS, OR FOR BOTH, FOR MEDICAL, SURGICAL OR HOSPITAL CARE BENEFITS.

(b) An employer may provide such equivalent accident and health or life insurance coverage or welfare [fund] PLAN payments or contributions by: (1) Insuring his full liability under this section in any stock or mutual companies or associations that are or may be authorized to take such risks in this state; (2) creating an injured employee's

plan as an extension of any existing plan for working employees; (3) self-insurance; or (4) by any combination of the methods provided in subdivisions (1) to (3), inclusive, of this subsection that he may choose.

(c) In the case of an employee welfare [fund] PLAN, an employer may provide equivalent protection by making payments or contributions for such hours of contributions established by the trustees of the employee welfare [fund] PLAN as necessary to maintain continuation of such insurance coverage when the amount is less than the amount of regular hourly or weekly contributions for full-time employees.

(d) In any case where compensation payments to an individual for total incapacity under the provisions of section 31-307, as amended by section 23 of [this act] PUBLIC ACT 91-32 AND SECTION 26 OF THIS ACT, continue for more than one hundred four weeks, the cost of accident and health insurance or life insurance coverage after the one hundred fourth week shall be paid out of the second injury fund in accordance with the provisions of section 31-349, as amended by section 35 of [this act] PUBLIC ACT 91-32 AND SECTION 36 OF THIS ACT.

(e) Accident and health insurance coverage may include, but shall not be limited to, coverage provided by insurance or directly by the employer for the following health care services: Medical, surgical, dental, nursing and hospital care and treatment, drugs, diagnosis or treatment of mental conditions or alcoholism, and pregnancy and child care.

Public Act No. 91-339, §1 (10)

Section 1. Section 31-275 of the general statutes, as amended by section 1 of public act 91-32, is repealed and the following is substituted in lieu thereof:

As used in this chapter and in sections 10 to 14, inclusive, of [this act] PUBLIC ACT 91-32, unless the context otherwise provides:

(10) "Employer" means any person, corporation, firm, partnership, voluntary association, joint stock association, the state and any public corporation within the state using the services of one or more employees for pay, or the legal representative of any such employer, but all contracts of employment between an employer employing persons excluded from the definition of employee and any such employee shall be conclusively presumed to include the following mutual agreements between employer and employee: (A) That the employer may accept and become bound by the provisions of this chapter by immediately complying with section 31-284, as amended by section 7 of [this act] PUBLIC ACT 91-32 AND SECTION 11 OF THIS ACT; (B) that, if the employer accepts the provisions of this chapter, the employee shall then be deemed to accept and be bound by such provisions unless the employer neglects or refuses to furnish immediately to the employee, on his written request, evidence of compliance with section 31-284, as amended by section 7 of [this act] PUBLIC ACT 91-32 AND SECTION 11 OF THIS ACT, in the form of a certificate from the commissioner, the insurance commissioner or the insurer, as the case may be; (C) that the employee may, at any time, withdraw his acceptance of, and become released from, the provisions of this chapter by giving written or printed notice of his with-

drawal to the commissioner and to the employer, and the withdrawal shall take effect immediately from the time of its service on the commissioner and the employer; and (D) that the employer may withdraw his acceptance and the acceptance of the employee by filing a written or printed notice of his withdrawal with the commissioner and with the employee, and the withdrawal shall take effect immediately from the time of its service on the commissioner and the employee. The notices of acceptance and withdrawal to be given by an employer employing persons excluded from the definition of employee and the notice of withdrawal to be given by the employee, as provided in this subsection, shall be served upon the commissioner, employer or employee, either by personal presentation or by registered or certified mail. In determining the number of employees employed by an individual, the employees of a partnership of which he is a member shall not be included. A person who is the sole proprietor of a business or who is a partner in a business may accept the provisions of this chapter by notifying the commissioner, in writing, of his intent to do so. If such person accepts the provisions of this chapter he shall be considered to be an employer and shall insure his full liability in accordance with subdivision (2) of subsection (b) of section 31-284, as amended by section 7 of [this act] PUBLIC ACT 91-32 AND SECTION 11 OF THIS ACT. Such person may withdraw his acceptance by giving notice of his withdrawal, in writing, to the commissioner.